Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Applications of	)	
	)	
AMERITECH CORPORATION,	)	
Transferor,	)	
	)	
AND	)	
	)	CC Docket No. 98-141
SBC COMMUNICATIONS, INC.	)	
Transferee	)	
	)	
For Consent to Transfer Control of	)	
Corporations Holding Commission	)	
Licenses and Lines Pursuant to Sections	)	
214 and 310(d) of the Communications Act	)	
and Parts 5, 22, 24, 25, 63, 90, 95, and 101	)	
of the Commission's Rules	)	

SBC'S REPLY COMMENTS

SBC has now demonstrated in two separate proceedings that Condition 17 sunset on March 24, 2003, the date the D.C. Circuit's *USTA I*[1] decision became final and non-appealable. Notwithstanding the plain terms of Condition 17, however, four CLEC parties—AT&T, MCI, ALTS and PACE—filed comments supporting the CLEC petition requesting that the Commission declare that Condition 17 has not yet sunset. Their comments, and thus their conclusions, are not grounded in the actual words in Condition 17. Rather, they reach their conclusions only by ignoring entirely the language of Condition 17 (ALTS), ignoring entire provisions (*i.e.*, the "null and void" sunset provision) of Condition 17 (PACE and AT&T), or by replacing the actual words and phrases of Condition 17 with words and phrases they create out of whole cloth (AT&T, MCI and PACE). The Commission should not countenance such sophistry.

[1] *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied* 123 S.Ct. 1571 (2003) ("*USTA I*").

Rather, focusing on the plain terms of Condition 17, the Commission should deny the CLECs' petition and declare that Condition 17 sunset on March 24, 2003.

As SBC discussed in its initial opposition, two passages in Condition 17 compel rejection of the CLEC petition. First and foremost, the final sentence of Condition 17 (*i.e.*, the "null and void" provision) states:

> This Paragraph shall become null and void and impose no further obligation on SBC/Ameritech after the effective date of a final and non-appealable Commission order in the UNE remand proceeding.[2]

As SBC discussed in its opposition, the triggering "date" for this provision was March 24, 2003. On that date, the Supreme Court denied petitions for certiorari to review the D.C. Circuit's vacatur of the *UNE Remand Order*. March 24, 2003, is thus the date on which the "order" issued by the Commission "in the UNE Remand Proceeding" (*i.e.* the *UNE Remand Order)* became final and non-appealable, and, by it own terms, Condition 17 sunset.

To counter this conclusion, the CLECs raise only the claim that the *UNE Remand Order* is not final and appealable.[3] That is absurd. As every middle school civics student knows full well, there is no appeal beyond the Supreme Court. The Supreme Court's denial of petitions for certiorari thus eliminated any possibility of further review or appeal of the *UNE Remand Order* and made that order final and non-appealable, triggering the sunset of Condition 17.

The fact that the subsequent *Triennial Review Order* was an order on remand from the same D.C. Circuit decision which vacated the *UNE Remand Order* does not alter this conclusion. Nor is there any inconsistency between SBC's position on the sunset of Condition 17 and its position that the D.C. Circuit was the proper court to review the *Triennial Review Order* as

[2] *SBC/Ameritech Merger Order*, App. C ¶ 53.
[3] *AT&T Comments* at 7; *MCI Comments* at 4.

PACE alleges.[4] SBC has never argued that the *Triennial Review Order*'s status as an order on remand somehow means that the *UNE Remand Order* did not become final and non-appealable when the Supreme Court denied petitions for certiorari to review the *USTA I* decision. The thread linking the *UNE Remand Order, USTA I,* and the *Triennial Review Order* for purposes of appellate forum is immaterial to the separate determination of whether the *UNE Remand Order* has become "final and non-appealable" for purposes of the sunset provision in Condition 17.

Perhaps it is for this very reason that the CLECs base their arguments on language that does not appear in Condition 17 in a vain attempt to alter the meaning of that provision. Contrary to their claims, however, Condition 17 does not sunset when the Commission issues a final and non-appealable unbundling "decision,"[5] when the Commission issues final and non-appealable unbundling "rules,"[6] or when the Commission issues a final and non-appealable "judgment"[7] as to unbundling rules. Nor is the sunset provision in Condition 17 triggered only upon the Commission's *UNE Remand Proceeding* becoming final and non-appealable. As a consequence, the fact that the *UNE Remand Proceeding* and the *Triennial Review Proceeding* (and, more generally, the Commission's quest to establish legally sustainable UNE rules) are still ongoing is completely beside the point. As discussed above, Condition 17's sunset provision is not triggered by the finality of those proceedings; rather, it was triggered once the Commission's *UNE Remand Order* became final and non-appealable. There is no dispute that, as a legal and factual matter, that order became final and non-appealable when the Supreme Court denied

[4] *See PACE Comments* at 7-8.
[5] *PACE Comments* at 2; *MCI Comments* at 4.
[6] *PACE Comments* at 5, 7, 8; *ALTS Comments* at 2.
[7] *AT&T Comments* at 7 n. 17.

petitions for certiorari to review the D.C. Circuit's vacatur of that order. By the plain terms of the "null and void" provision, therefore, Condition 17 sunset on March 23, 2004.[8]

That conclusion is further supported by the other sunset provision addressed by SBC in its opposition (*i.e.*, the "judicial decision" provision). That provision states:

> (ii) the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech in the relevant geographic area.[9]

As an initial matter, the CLECs have once again substituted made-up language in their comments for the actual words of Condition 17. The actual language of this provision does not require a Commission "unbundling order affirmed on appeal."[10] Nor does it provide that Condition 17 sunsets when "litigation surrounding the *UNE Remand Order*. . . is finally resolved, by a final judicial decision holding the FCC cannot require unbundling of a particular element."[11] The actual words in Condition 17 require as the trigger for sunset an order on appeal (*i.e.*, a "judicial decision") "providing" that UNEs are "not required to be provided."

USTA I undoubtedly is such a decision. In vacating the Commission's UNE rules, it "provided" that the UNEs that were the subject of those rules were no longer required to be

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[8] AT&T and MCI also regurgitate their claims that the "any subsequent proceedings" phrase in the Commission's adopting order means that Condition 17 has not yet sunset. *AT&T Comments* at 5; *MCI Comments* at 4. As SBC discussed in its opposition, the terms and language of the merger conditions themselves prevail over the short-hand description of those conditions in the Commission's adopting order. The merger conditions represent specific commitments made by SBC and Ameritech, who consummated their merger based upon the conditions as written and accepted by the Commission. SBC and Ameritech carefully drafted those commitments precisely to avoid the sort of open-ended obligations the CLECs now seek to impose, and the Commission adopted the commitments as written, annotated only by the footnotes the Commission added to the conditions themselves. The conditions do not allow the Commission to modify SBC's commitments without SBC's concurrence, and the Commission should not now alter its agreement. The Commission's general description in the narrative of its order is just that—a general description—and the Commission should reject the CLECs' attempt to substitute that general language for the actual terms of the conditions as agreed to by the parties.

[9] *SBC/Ameritech Merger Order*, App. C ¶ 53.

[10] *PACE Comments* at 8.

[11] *AT&T Comments* at 4; *see also id.* at 6 (Condition 17 has not sunset because *USTA I* was not a "final judicial decision holding the FCC cannot require unbundling.")

provided. Indeed, none of the CLECs dispute the fact that the Commission itself has agreed that *USTA I* eliminated the Commission's UNE rules at issue, and, in doing so, the D.C. Circuit provided that those UNEs were no longer required to be provided. Specifically, the Commission held in its *Triennial Review Order* that, upon the *USTA I* decision becoming "final and no longer subject to further review . . . the legal obligation [to provide UNEs] *will no longer exist*."[12] As discussed above, *USTA I* became final and no longer subject to review on March 23, 2004, when the Supreme Court denied petitions for certiorari. No party challenged the Commission's conclusion on this issue from the *Triennial Review Order*, which confirms that Condition 17 has sunset.[13]

Finally, as SBC discussed in its initial opposition, the CLECs' interpretation of Condition 17 must be rejected because it effectively annuls the sunset provisions in Condition 17. Under the CLECs' interpretation, Condition 17 never sunsets so long as the Commission has an open proceeding to consider the scope of its unbundling rules. The practical result of that interpretation is that Condition 17 never sunsets, because the Commission remains free to revisit its unbundling rules. Such a result simply can not be squared with the clear language of Condition 17 or with the "Commission's express policy, as stated in the *SBC/Ameritech Merger Order*, to obligate SBC's compliance with the merger conditions for a finite period of time."[14]

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[12] *Triennial Review Order* ¶ 705 (emphasis added). AT&T argues that the Commission's agreement that *USTA I* eliminated the obligation to provide UNEs "had nothing to do with the independent obligations imposed by the *Merger Orders*." *AT&T Comments* at 10. AT&T misses the point entirely. The Commission's agreement as to the effect of *USTA I—i.e.*, that *USTA I* eliminated SBC's obligation to provide UNEs—proves that the *USTA I* decision triggered the "judicial decision" sunset provision of Condition 17.

[13] AT&T claims that the conclusion by Verizon's auditor as to the sunset of Verizon's merger condition is irrelevant because the auditor is not "the arbiter of the plain meaning of this condition." *AT&T Comments* at 8. At least with respect to SBC, however, the auditor's interpretation of Condition 17 was issued with the concurrence of Commission Staff, and it would surely be arbitrary and capricious for the Commission to disregard its own Staff's interpretation of Condition 17's sunset provisions.

[14] Letter from William Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, to Jim Lamoureux, Senior Counsel, SBC Communications, Inc., CC Docket No. 98-141 (April 26, 2004).

Thus, to remain consistent with the actual terms of the merger conditions and faithful to Commission policy, Condition 17 must mean what it says: it became null and void (*i.e.,* it sunset) on the date the Commission's November 5, 1999, *UNE Remand Order* became final and non-appealable—March 24, 2003.

Respectfully Submitted,

SBC COMMUNICATIONS INC.

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October 19, 2004